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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-231

ALEXANDER BISCUITTI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

ALEXANDER BISCUITTI,
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STATE OF FLORIDA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

ALEXANDER BISCUITTI, Petitioner, prays that a writ of certiorari issue to review the Opinion of the District Court of Appeal of Florida, Fourth District, entered on September 29, 1971, and reported at 253 So. 2d (Fla. App.).

(a) OPINION BELOW

Review is sought of the opinion of the District Court of Appeal of Florida, Fourth District, entered on September 29, 1971, and reported at 253 So. 2d (Fla. App. 1971). A copy of this opinion is appended to this

petition as Appendix A. Petition for Rehearing was denied November 10, 1971 (Appendix B). Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied on March 20, 1972. (Appendix C). Petition for rehearing filed in the Supreme Court of Florida was denied on May 10, 1972. Motion to Stay Mandate was granted by the Supreme Court of Florida on May 10, 1972. (Appendix D).

Application for Stay of Mandate was filed in the Supreme Court of the United States. No order has been entered.

The Defendant was adjudicated guilty of two counts of possession of blank, forged, fictitious, counterfeit or unlawfully issued driver's licenses by the Court of Record, in and for Broward County, Florida, on February 18, 1971 to five years on each count. The sentences were to run consecutively.

(b) GROUNDS FOR JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) because a title, right, privilege or immunity claimed under the Constitution of Statutes of the United States was denied by the District Court of Appeal of Florida, Fourth District. Jurisdiction is also invoked under Rule 19 (1)(a) of the Rules of the Supreme Court of the United States, adopted June 15, 1970, effective July 1, 1970 as amended November 30, 1971, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

(c) QUESTION PRESENTED FOR REVIEW

WHERE THERE IS AN ABSENCE OF ANY EVIDENCE PROVING AN ESSENTIAL ELEMENT OF A CRIME CHARGED BY THE STATE, IS A CONVICTION VALID UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

(d) CONSTITUTIONAL STATUTORY AND RULES PROVISIONS INVOLVED

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE

SECTION 1257 (3) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn

in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES

RULE 19 (1) (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

FLORIDA STATUTE

322.212 (1) It is unlawful for any person knowingly to have in his possession any blank, forged, stolen, fictitious, counterfeit, or unlawfully issued operator's or chauffeur's license unless possession by such person has been duly authorized by the department or county judge of any county or his designate.

(e) STATEMENT OF THE CASE

On May 15, 1970, the Petitioner was charged by Information with two counts of possession of blank, forged, fictitious, counterfeit or unlawfully issued driver's licenses in the Court of Record in and for Broward County, Florida.

On December 18, 1970, the Petitioner was tried by jury, and found guilty on both counts.

On February 18, 1971, the Petitioner was adjudicated guilty and sentenced to five years on each count. The sentences were to run consecutively.

The District Court of Appeal of Florida, Fourth District, affirmed the conviction (App. A). Petition for rehearing was denied (App. B).

Petition for writ of certiorari filed in the Supreme Court of Florida was denied (App. C). Petition for rehearing was denied on May 10, 1972 (App. D).

(f) STATEMENT OF THE FACTS

The search for blank, forged, counterfeit or fictitious motor vehicle licenses or titles was made on May 13, 1970, at 3901 Washington Street, Hollywood, Florida, under the authority of a search warrant. The home located at this address did not belong to Petitioner. The warrant was not directed to the Petitioner.

An envelope addressed to Mr. and Mrs. Julio Palmiro, the sole owners of the home, was found on the top of a dresser in the southeast bedroom of their home. In that envelope were found two driver's licenses which were the subject matter of the Information filed against Petitioner. Other papers were found in the envelope.

Petitioner was not a permanent resident of the home. Ten or twelve people lived in the house for a period of months during the

time involved. During this same period of time, petitioner was away from the house, and in fact out of the state on many occasions.

Petitioner was not present at the time the items were located. Petitioner never had knowledge of the existence of the driver's licenses, or the envelope, or how they got there. He had never even seen the driver's licenses before being confronted with them on May 13, 1971.

Petitioner never had possession of the driver's licenses. No evidence was ever presented even indicating that petitioner was in possession of the driver's licenses.

Petitioner had never been convicted of a crime. He was never arrested nor charged of any other offense other than for traffic violations.

This case represents petitioners first experience in court.

(g) REASON FOR GRANTING THE WRIT

In this case the facts proven were:

1. An envelope was mailed to one, Julio Palmira, at his home in Hollywood, Florida.

2. That envelope was later found on a bedroom dresser in Palmiro's home. There was no evidence as to how long it had been there, whether minutes or weeks. The envelope contained two blank New York driver's licenses.

3. Petitioner, who had been living on and off in the house for several months was not present at the time the envelope was

found.

4. Many others had access to the house, as well as the bedroom, for a period of months besides Petitioner and his wife or Palmiro and his wife.

5. Petitioner absolutely denied any knowledge of the existence or presence of the driver's licenses.

6. Petitioner was sentenced to 10 years in jail for possession of the two blank New York driver's licenses.

This Court held in Thompson v. City of Louisville, et al, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, that due process is denied where a conviction is entered against a defendant where there is an absence of evidentiary support of the crime charged.

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence but whether this conviction rests upon any evidence at all."

In Thompson, supra, this Court also pointed out that there must be evidence supporting each element of the crime charged.

Here, there is no evidence of any kind supporting the element of possession of the licenses.

There was no physical possession of the licenses, therefore constructive possession must necessarily be the theory involved.

There was, however, no such exclusivity of control of the premises as to permit a supportable conclusion of constructive possession. There was no evidence of any kind fixing the important element of time. There is nothing to reject the conclusion that the envelope may have been placed on the premises during the search, five minutes before, an hour before, or at any time since its mailing.

Petitioner was not present during the search.

In Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d, 1460, 78 S. Ct. 1332, it is stated:

> "Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

It would seem to be a travesty of justice to permit a conviction and sentence of ten years or even one day imprisonment on a case as devoid of evidence as this.

CONCLUSION

We respectfully urge the issuance of the writ to the end that the entire record may be reviewed.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
North Bay Professional Bldg.
1720-79th Street Cswy., Suite 110
Miami Beach, Florida 33141

BY: _____
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for writ of certiorari to the District Court of Appeal of Florida, Fourth District in the Supreme Court of the United States was mailed to the Honorable Robert L. Shevin, Attorney General, Tallahassee, Florida and to Charles W. Musgrove, Assistant Attorney General, 225 Pan American Building, West Palm Beach, Florida this 8th day of August, 1972.

_____
MILTON E. GRUSMARK

Printed copies mailed:

_____

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JULY TERM 1971

ALEXANDER BISCUTTI,
Appellant

v. CASE NO. 71-126.

STATE OF FLORIDA,
Appellee.

Decision filed September 29, 1971.

Appeal from the Court of Record for Broward County; Robert W. Tyston, Jr., Judge.

David B. Javits and Milton E. Grusmark, Miami Beach, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Charles W. Musgrove, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

WALDEN, CROSS, JJ., and AGNER, ROYCE, Associate Judge, concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JULY TERM 1971

ALEXANDER BISCUTTI,
Appellant,

v. CASE NO. 71-126.

STATE OF FLORIDA,
Appellee.

November 10, 1971.

ORDERED that appellant's petition for rehearing, filed October 13, 1971, is hereby denied; further,

ORDERED that appellant's motion for delay of mandate, filed October 26, 1971, is hereby denied.

A TRUE COPY

s/Emmett J. Comiskey
EMMETT J. COMISKEY
CLERK

cc: Law Offices of Milton E. Grusmark
Nelson E. Bailey, Esq.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1972
MONDAY, MARCH 20, 1972

ALEXANDER BISCUITTI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 41,736

DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., ERVIN, BOYD, McCAIN and DEKLE, JJ., concur

cc: Honorable Emmett J. Comiskey
Honorable Clyde L. Heath
Honorable Robert W. Tyson, Judge
Honorable Milton E. Grusmark
Honorable Nelson E. Bailey

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: s/D. Lang Jr.
DAVE LANG, JR.
sg Chief Deputy Clerk
Supreme Court of Florida

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1972
WEDNESDAY, MAY 10, 1972

ALEXANDER BISCUITTI,
Petitioner,

vs. CASE NO. 41, 736

STATE OF FLORIDA,
Respondent.

The Petition for Rehearing is denied and it is further

ORDERED that proceedings in this Court and the lower courts are hereby stayed to and including June 9, 1972, to enable Petitioner to seek review in the Supreme Court of the United States and obtain any further stay in that Court.

cc: Hon. Clyde L. Heath, Clerk
Hon. Emmett J. Comiskey, Clerk
Hon. Milton E. Grusmark
Hon. Charles W. Mustrove

A True Copy

TEST:

s/Sid J. White
Sid J. White
Clerk Supreme Court.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-231

ALEXANDER BISCUITTI,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

ROBERT L. SHEVIN
Attorney General
State of Florida
Tallahassee, Florida

NELSON E. BAILEY
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West Palm Beach, Florida

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-231

ALEXANDER BISCUITTI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
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The State of Florida accepts those portions of Petitioner Alexander Biscuitti's brief where he sets forth (1) the opinion from which he appeals, (2) his statement of the jurisdictional basis which he desires to invoke, (3) the constitutional, statutory, and rules provisions involved, and (4) his statement of the case. The State of Florida

rejects (1) Petitioner's statement of the facts, (2) his presentation of the reasons for granting the writ, and (3) his representation of the question presented for review. The State of Florida submits the following QUESTION PRESENTED FOR REVIEW and STATEMENT OF FACTS in their stead.

QUESTION PRESENTED FOR REVIEW

Whether there was a total absence of any evidence proving an essential element of the crime for which Petitioner Alexander Biscuitti now stands convicted, thus making Petitioner's conviction a violation of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF FACTS

On 13 May 1970 Florida law enforcement officers executed a lawful search warrant, searching for blank, forged, counterfeit or fictitious motor vehicle licenses at 3901 Washington Street, Hollywood, Florida. At a subsequent trial of Petitioner Alexander Biscuitti for the crime of possessing blank, forged, counterfeit or fictitious driver's licenses, an officer Hampton, one of the officers who had taken part in the search of the house on

Washington Street, testified as to what occurred there.

Officer James T. Hampton of the Hollywood Police Department testified that in executing the search warrant he found an envelope containing several documents. He found it in the top of a dresser on the west wall in the southeast bedroom of the house. [TT 34, 36-37]. The envelope contained the two blank New York state driver's licenses, with identical numbers, which served as the basis of the criminal charges against Petitioner in this case, [TT 37]. The same envelope also contained

(1) a time extension motor vehicle inspection for the State of New York, without a name on it;

(2) a vehicle inspection sticker;

(3) a New York state renewal transfer certificate for motorcycle registration in the Petitioner's name;

(4) a New York state driver's record of convictions in Petitioner's name;

(5) a driver's license for the State of New York in Petitioner's name;

(6) a New York state certificate of registration of a motorcycle in the Petitioner's name;

(7) part of a New York driver's license in Petitioner's name;

(8) a summons in the Criminal Court for the City of New York, for having no driver's license, in the name of the Petitioner;

(9) registration certificate for a motor vehicle in Connecticut in the name of Maureen Mary Fenton;

(10) receipt for certified mail sent to a Mr. B. Dibertolo, New York;

(11) another New York driver's license in part, in the Petitioner's name;

(12) miscellaneous business cards;

(13) two photographs; and

(14) a port security identification card in the name of Petitioner. [TT 36-37].

When the search of the bedroom took place Petitioner was not

present. [TT 39]. The envelope in which these numerous documents were found was addressed to Mr. & Mrs. Julio Palmeri. [TT 40].

Petitioner Alexander Biscuitti arrived at the house before the officer's had concluded their search of the premises. The two blank New York driver's licenses were shown to Petitioner by Officer Hampton, after full Miranda rights had been explained; and Petitioner denied any knowledge about the blank licenses. [TT 56-57]. Officer Hampton then asked Petitioner, "Well, what about all the stuff with the licenses; does this belong to you?" Petitioner said yes, they were his, but that he knew nothing about the blank licenses. [TT 57-58].

Officer Hampton also inquired about the bedroom in which the envelope had been found, and Petitioner acknowledged he and his wife slept in that particular bedroom. [TT 60].

Officer Hampton also testified he personally had observed Petitioner at the Washington-Street house on numerous occasions during April and May. [TT 60-61].

During trial of this case Petitioner himself took the witness stand. Petitioner Biscuitti testified that he, his wife and 12-month-old

child were staying at this residence on Washington Street.

> "Being we had the office in Julio's house we had moved over to Julio's for a couple of days." [TT 125]

On cross-examination he admitted to staying with his wife in the house for at least eight days before it was searched by the law officers. [TT 126]. He also testified that when the search occurred, altogether there were seven persons living in the whole house. [TT 126].

The State at Petitioner's trial introduced "similar fact evidence" which further established Petitioner's knowledgeable possession of the licenses, and established his modus operandi, i.e., his participation in a scheme of fraudulent possession and use of motor vehicles through the use of false motor vehicle documents from the state of New York.

Officer Hampton testified that his search of the house resulted in discovery of a wallet on the dining room table.[TT 99]. The wallet contained a New York transfer registration for an automobile. [TT 75, 99]. On its face the document was issued to Petitioner Alexander Biscuitti. [TT 76]. The registration

was for a yellow, two-door, 1966 Chevrolet. [TT 76].

Two police officers at trial testified they personally had observed Petitioner driving that very car. [TT 76, 86]. Yet when Petitioner Biscuitti was confronted with the registration, he said he knew nothing about it and had never seen it before. [TT 99]. Petitioner said the car was not his. [TT 89].

The identification number or serial number on the certificate matched the number posted for public view on the door post of the automobile; but it did not match the secondary or confidential numbers placed elsewhere on the automobile. [TT 86-88]. The public door-post number on this car had been altered, matching the registration certificate in Petitioner's name.

ARGUMENT

A rather obvious truth was recognized by the United States Supreme Court in Thompson v. City of Louisville, et al., 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960): that is, when a person's criminal conviction by jury trial is based on no evidence whatsoever proving his guilt, that person is denied his constitutional right to due process of law. In recognizing this truth the Court also pointed out the very real and fundamental difference between, on one hand, a total absence of evidence proving guilt and, on the other hand, an insufficiency in the evidence.

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."
> Thompson v. City of Louisville, et al., supra, at 4 L.Ed.2d, 655.

See also: Shuttlesworth v. City of Birmingham, 382 U.S. 87, 15 L.Ed. 2d 176, 86 S.Ct.211, (1965).

It is apparent that Petitioner with this principle firmly in mind, framed his presentation of the controlling facts in this case and of the "question" to be resolved, accordingly. Petitioner states the "question" to be:

> "WHERE THERE IS AN ABSENCE OF ANY EVIDENCE PROVING AN ESSENTIAL ELEMENT OF A CRIME CHARGED BY THE STATE, IS A CONVICTION VALID UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES."

Petitioner says the essential element not proven in this case was the element of actual "possession." He was convicted for possession of blank, forged,counterfeit or fictitious motor vehicle operator's licenses. Petitioner sets out the "facts" as follows:

> "An envelope addressed to Mr. and Mrs. Julio Palmeri, the sole owners of the home, was [pursuant to a valid search warrant] found on the top of a dresser in the southeast bedroom of their home. In that envelope were found two driver's licenses which were the subject matter of the Information filed against Petitioner. Other papers

were found in the envelope.

> Petitioner was not a permanent resident of the home. Ten or twelve people lived in the house for a period of months during the time involved. During this same period of time, petitioner was away from the house, and in fact out of the state on many occasions.
>
> Petitioner was not present at the time the items were located. Petitioner never had knowledge of the existence of the driver's licenses, or the envelope, or how they got there. He had never seen the driver's licenses before being confronted with them on May 13, 1971.
>
> Petitioner never had possession of the driver's licenses. No evidence was ever presented even indicating that petitioner was in possession of the driver's licenses."

The facts of this case--as presented to the Court by Petitioner--most certainly do raise a question of whether he was deprived of his liberty without the state first

meeting its responsibility to produce evidence proving his guilt, resulting in Petitioner being denied his right to due process of the law.

Petitioner's arguments twist around the facts a good deal like a setter pup chasing his tail--never really grabbing ahold of what is there. The record developed in the state courts in this case tells a story that is a bit different than the one told by Petitioner: because the record adds a couple relevant facts to the story.

Petitioner claims the evidence of his possession was completely non-existant: that the State proved nothing more than the unlawful licenses were found in a residence where Petitioner lived but which was not exclusively Petitioner's abode. Petitioner overlooks that the envelope in which the licenses were found was not only discovered in a bedroom occupied by Petitioner and his wife, but the envelope contained other documents that he acknowledged were his. The existance of these other documents in the envelope, all of which belonged to Petitioner, is just the type evidence which justifies a jury in finding that the licenses also were property of Petitioner's. True, it is circumstantial evidence, but, like a setter pup that's been caught with the

feathers on its chops, the evidence is nevertheless real and nonetheless sufficient to prove his guilt.

So the question in this case actually is one of sufficiency of the evidence; it is not a question of there being, "an absence of any evidence proving an essential element of a crime." Since this case does involve only an issue of sufficiency of the evidence and not one of whether Petitioner's conviction rests upon any evidence at all, there can be no issue whether his conviction is unconstitutional under the Due Process Clause of the Fourteenth Amendment, Cf. Thompson v. City of Louisville, et al., supra. Consequently, the decision of the state appellate court, upon which this petition for Writ of Certiorari is grounded, presents no substantial federal question.

CONCLUSION

WHEREFORE the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
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NELSON E. BAILEY
Assistant Attorney General
225 Pan-American Building
West Palm Beach, Florida

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERITFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District has been furnished to Honorable Milton E. Grusmark, Attorney for Petitioner, North Bay Professional Building, 1720-79th Street Cswy., Suite 110, Miami Beach, Florida, 33141, by mail this day of November, 1972.

NELSON E. BAILEY
Assistant Attorney General